Bank Pertanian Malaysia v Zainal Abidin bin Kassim & Anor

HIGH COURT (ALOR SETAR) — ORIGINATING SUMMONS NO 24-507-94
MOHD HISHAMUDIN J
20 MARCH 1995

Civil Procedure *— Originating summons — Charge action — Order for sale — Whether affidavit in support must state amount of repayments and instalments in arrear — Rules of the High Court 1980 O 83 r 3(6)*

Land Law *— Order for sale — Affidavit in support — Whether must state amount of repayments and instalments in arrear — Rules of the High Court 1980 O 83 r 3(6)*

The plaintiff, as chargee of the defendant's land, applied for an order for sale of the land under s 256 of the National Land Code 1965 and O 83 of the Rules of the High Court 1980 ('the RHC'). The affidavits in support of the plaintiff's summons only stated the amount of interest and the total amount outstanding under the charge but did not provide any particulars on the amount of repayments and instalments in arrear. The defendant submitted that failure to provide the aforesaid information amounted to a non-compliance with O 83 r 3(6) of the RHC and was fatal to the application. On the other hand, the plaintiff submitted that r 3(6) was applicable only in cases where there was a claim for the payment of moneys secured by a charge and was not applicable in the present case because the relief claimed was for the sale of the charged property.

Held, dismissing the application:

(1) The failure to comply with r 3(3) and (6), in particular, the failure to state the amount of the repayments and instalments in arrear were serious omissions which warranted a dismissal of the action for the absence of such pertinent information was highly prejudicial to the defendants. Fairness requires the chargee to state and state accurately the amount of repayments made and the amount of instalments in arrear.

(2) The plaintiff's argument that the relief prayed for was only for the sale of the charged property was contradicted by the second prayer in the originating summons which was a claim for moneys secured by the charge. The application was actually a claim for payment of moneys secured by the charge as well as for sale of the charged property.

[Bahasa Malaysia summary

Plaintif, sebagai pemegang gadaian atas tanah defendan, telah memohon suatu perintah jualan tanah itu di bawah s 256 Kanun

Tanah Negara 1965 dan A 83 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Afidavit yang menyokong saman plaintif hanya menyatakan jumlah faedah dan jumlah keseluruhan yang belum dijelaskan di bawah gadaian itu tetapi tidak memberi apa-apa butir tentang jumlah pembayaran balik dan ansuran yang tertunggak. Defendan berhujah bahawa kegagalan untuk memberikan maklumat tersebut merupakan suatu ketidakpatuhan dengan A 83 k 3(6) KMT dan membawa padah kepada permohonan itu. Sebaliknya, plaintif berhujah bahawa k 3(6) terpakai hanya di dalam kes di mana terdapat suatu tuntutan untuk wang yang dijamin oleh sesuatu gadaian dan tidak terpakai di dalam kes ini kerana relief yang dituntut adalah untuk penjualan hartanah yang digadai.

Diputuskan, menolak permohonan itu:

(1) Kegagalan untuk mematuhi k 3(3) dan (6), terutamanya, kegagalan untuk menyatakan jumlah pembayaran balik dan ansuran yang tertunggak adalah suatu peninggalan yang serius yang mewajarkan suatu penolakan tindakan itu kerana ketiadaan maklumat yang diperlukan itu sangat memudaratkan defendan. Keadilan memerlukan seseorang pemegang gadaian untuk menyatakan dan menyatakan dengan tepat jumlah pembayaran balik yang telah dibuat dan jumlah ansuran yang tertunggak.

(2) Hujah plaintif bahawa relief yang dipohon adalah hanya untuk penjualan hartanah itu disangkal oleh permohonan kedua di dalam saman pemula yang merupakan suatu tuntutan untuk wang yang dijamin oleh gadaian itu. Permohonan itu sebenarnya adalah suatu tuntutan untuk wang yang dijamin oleh gadaian itu dan juga untuk penjualan hartanah yang digadai itu.]

Legislation referred to

National Land Code 1965 s 256
Rules of the High Court 1980 O 83 rr 1, 3(3), 3(6)

Salina bte Shahabudin (*Chin Len Chong, Kamaruddin & Co*) for the plaintiff.

Anita Sharma (*Sharma & Associates*) for the defendants.

Cur Adv Vult

Mohd Hishamudin J: This is a charge action by the plaintiff/chargee against the defendants/chargors pursuant to s 256 of the National Land Code 1965 and O 83 of the Rules of the High Court 1980 ('the RHC').

Section 256 reads:

Application to Court for order for sale.

(1) This section applies to land held under —

(a) Registry title;

(b) the form of qualified title corresponding to Registry title; or

(c) subsidiary title,

and to the whole of any undivided share in, or any lease of, any such land.

(2) Any application for an order for sale under this Chapter by a chargee of any such land or lease shall be made to the Court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure.

(3) On any such application, the Court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary.

Order 83 r 1 states:

Application and interpretation

(1) This Order applies to any action (whether begun by writ or originating summons) by a chargee or chargor or by any person having the right to foreclose or redeem any charge, being an action in which there is a claim for any of the following reliefs namely —

(a) payment of moneys secured by the charge;

(b) sale of the charged property;

(c) foreclosure;

(d) delivery of possession (whether before or after foreclosure or without foreclosure) to the chargee by the chargor or by any other person who is or is alleged to be in possession of the property;

(e) redemption;

(f) reconveyance of the property or its release from the security;

(g) delivery of possession by the chargee.

(2) In this Order 'charge' includes a legal and an equitable charge.

(3) An action to which this Order applies is referred to in this Order as a charge action.

(4) These rules apply to charge actions subject to the following provisions by this Order.

By prayer 1 of the originating summons, the plaintiff applies for an order that the land charged be sold by the court by public auction. The prayer reads:

Bahawa harta yang terkandung di SPB 44577 Lot No 1573 Mukim Kota Setar, Daerah Kota Setar, Kedah di dalam Perserahan No 10,969/92 Jil 510 Fol 39 dijual secara lelongan awam pada satu tarikh yang akan ditetapkan oleh penolong kanan pendaftar di mana tarikh itu tidak kurang dari satu (1) bulan selepas tarikh perintah dibuat.

By prayer 2, the plaintiff applies for an order that the defendants pay the plaintiff the outstanding amount secured by the charge together with interest. The prayer reads:

Bahawa defendan hendaklah membayar amaun sebanyak RM48,766.52 setakat 28 February 1994 berserta dengan faedah pada kadar 2% setahun melebihi kadar asas berian pinjaman (kadar asas 8.5%) dan faedah tambahan

yang dikenakan atas jumlah yang dituntut adalah pada kadar 1% melebihi kadar faedah setahun dan dikira tiap-tiap hari mulai 1 Mac 1994 sehingga penyelesaian kepada plaintiff di bawah gadaian tersebut.

The plaintiff, in their first supporting affidavit (encl 2), stated that the amount of the loan was RM60,000 and that the amount they were claiming under the originating summons, as of the time of filing, was RM48,766.52. But it is pertinent to note that the affidavit did not furnish further particulars of the account. In particular, nothing was stated as to:

(a) the amount of the repayments (if any) made by the defendants/ borrowers; or

(b) the amount of any interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit (28 May 1994).

Also, the affidavit did not explain how the amount of RM48,766.52, which the plaintiff alleged as still owing, was arrived at.

Subsequently, however, the plaintiff, filed two more affidavits, encls 12 and 16, to provide the updated information on the account. Enclosure 12 was filed on 29 August 1994 and encl 16 was filed on 1 October 1994. These affidavits, however, like encl 2, only state the amount of interest in arrear and the total amount still remaining under the charge. Enclosure 12 states that the sum outstanding (inclusive of interest) as of 30 August 1994 was RM51,616.94; while encl 16 states that the amount owing (inclusive of interest) as of 1 October 1994 was RM52,115.38. These two affidavits, like the first affidavit (encl 2), do not provide particulars regarding:

(a) the amount of repayments; and

(b) the amount of instalments in arrear at the date of the affidavit.

The defendants did not file any affidavits in reply. However, based on the above facts (and omissions), Cik Anita Sharma, learned counsel for the defendants, submits on a point of law. She submits that by reason of the failure on the part of the plaintiff to provide the information on (a) and (b) above, therefore, there had been noncompliance with O 83 r 3(6). This r 3(6) stipulates:

> Where the plaintiff *claims payment of moneys secured by the charge*, the affidavit must prove that the money is due and payable and give the particulars mentioned in paragraph (3). (Emphasis added.)

Rule 3(3), as referred to by r 3(6) above, provides:

> Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, the state of the account between the chargor and chargee with particulars of —
>
> (a) the amount of the advance;
>
> (b) the amount of the repayments;

(c) the amount of any interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit; and

(d) the amount remaining due under the charge.

Cik Sharma argues that this non-compliance is fatal to the application.

On the other side, Cik Salina bte Shahabudin, the learned counsel for the plaintiff, submits that in view of the words '[w]here the plaintiff claims payment of money secured in the charge' in r 3(6), that rule is applicable only in cases where there is a claim for the payment of moneys secured by a charge. She contends that r 3(6) is not applicable in the present case because the relief claim is merely for the sale of the charged property and not for the payment of moneys secured by the charge.

In my opinion, the failure to comply with rr 3(6) and 3(3), in particular, the failure to state:

(a) the amount of the repayments; and

(b) the amount of instalments in arrear,

are serious omissions which warrant a dismissal of the action; for the absence of such pertinent information is highly prejudicial to the defendants. Especially so in the present case where, in view of the fact that the amount owing as alleged in the affidavit in encl 2 (RM48,766.52) is much lower than the amount of the loan (RM60,000), it is fair to infer that some repayments must have been made by the defendants. Fairness requires the chargee not only to state in the affidavit but also to state accurately the amount of repayments made and the amount of instalments in arrear. It hardly needs to be reiterated here that the purpose of the rule is also to protect the interest of the debtor/chargor.

In my view, with respect, there is no merit in Cik Salina's argument that the relief prayed for in this originating summons is only for the sale of the charged property (and hence rr 3(6) and 3(3) are not applicable). This is contradicted by the presence of prayer 2 of the originating summons referred to earlier, which is a claim for moneys secured by the charge. To my mind, in view of prayers 1 and 2, the present application is not merely for a sale of the charged property. It is actually a claim for both: for payment of moneys secured by the charge as well as for sale of the charged property. In other words it is a claim for the reliefs referred to in para (1) (a) and (b) of r 1 of O 83.

Accordingly, this application is dismissed with costs.

Application dismissed.

Reported by Anne Khoo